

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

UNITED STATES OF AMERICA, : :

Plaintiff, : Case No. 3:07cr0086
: Case No. 3:10cv0298

vs. : District Judge Walter Herbert Rice
: Magistrate Judge Sharon L. Ovington

ANGEL ROJAS, aka MARTIN,

Defendant. : :

REPORT AND RECOMMENDATIONS¹

I. INTRODUCTION

This case is before the Court on an initial filing for screening under 28 U.S.C. § 1915. Petitioner has filed a Petition for Writ of Audita Querela pursuant to 28 U.S.C. § 1651. Because Petitioner is proceeding *in forma pauperis*, his Petition is to be screened prior to issuance of any process. 28 U.S.C. § 1915(e)(2).

II. ANALYSIS

Petitioner filed a Petition for Writ of Audita Querela in Case No. 3:10cv297, challenging his convictions in Case No. 3:07cr081. Therein, Magistrate Judge Micheal R. Merz issued a Report and Recommendations and a Supplemental Report and

¹ Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendations.

Recommendations recommending that the petition be dismissed because a Petition for Writ of Audita Querela cannot be used to circumvent the one-year statute of limitations for the filing of a §2255 motion. District Judge Walter Herbert Rice adopted the Reports and Recommendations in that case. The exact same reasoning applies herein.

It is therefore recommended that the Petition for Writ of Audita Querela (Doc. # 103) be dismissed without prejudice for failure to state a claim upon which relief may be granted. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied leave to appeal *in forma pauperis*.

s/Sharon L. Ovington
Sharon L. Ovington
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F). Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof.

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).